Petition

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES E. OUTLER, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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*Former Fifth Circuit Case, Section 9(1) of Public Law 96-452-October 14, 1980.

January 22, 1982

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, James E. Outler, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit * entered in this proceeding on October 26, 1981.

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

QUESTIONS PRESENTED

1. Whether the indictment should have been dismissed for governmental misconduct, where investigating officers deliberately used a television-news reporter, as an undercover agent, to instigate, create and disseminate adverse pre-indictment publicity,where no petit jury prejudice was thereby caused.

2. Whether the court of appeals failed to give effect to petitioner's offer of proof thereby depriving him of his right to adjudication of a justiciable issue.

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The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Middle District of Georgia.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 26, 1981. A timely petition for rehearing by petitioner was denied on November 24, 1981. A timely petition for rehearing by respondent was denied on December 30, 1981. This petition for certiorari was filed within 60-days of the denial of the petition for rehearing. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

United States Code, Title 28:

§455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

Rule 103, Federal Rules of Evidence:

Rule 103. Rulings of Evidence.

(a) Effect of erroneous ruling. —Error may not be predicated

upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. —In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. —In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. —The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. —In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

> (d) Plain error. —Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

STATEMENT OF THE CASE

Petitioner-physician was convicted in the United States District Court on 15 counts of unlawful dispensing and 5 counts of unlawful possession of controlled substances. The Court of Appeals reversed the conviction of the 15 dispensing counts and affirmed the conviction of the 5 possession counts.

Petitioner seeks a writ of certiorari from the Court of Appeals' affirmance of the 5 possession counts.

In October of 1979, a federal Drug Enforcement Administration agent provided information to the Georgia Bureau of Investigation which caused that agency to initiate an undercover investigation of petitioner's medical practice. The under-

cover agents involved were all employees of the G.B.I., with one noteable exception. One of the undercover agents was recruited by G.B.I. agents to conduct the investigation of petitioner in a dual capacity: to-wit, as a state-sanctioned law enforcement official, and as an Atlanta television investigative reporter preparing a film documentary. The television reporter carried a recording device into petitioner's office to record conversations while she posed as a patient.

The resulting film documentary was televised [1/] in two parts on November 22 and 23, 1979, three and four days

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1/ Although the telecast originated in Atlanta, the viewing area included Macon, the site of subsequent grand jury proceedings.

respectively, after execution of a federal search warrant which resulted in the seizure of medical records and other evidence which had been seized from petitioner's office. The film also utilized photographs of evidence which had been seized from the petitioner's office under the federal search warrant and a written prescription procured during the investigation and subsequently introduced into evidence. Additionally, the film utilized some of the surreptitiously recorded voice tapes made by the agents in the course of the investigation.

A federal indictment was returned against the petitioner on May 9, 1980, charging petitioner with 15 counts of unlawful dispensing and 5 counts of unlawful possession of controlled substances.

A pre-trial motion filed by petitioner sought a dismissal of all counts of the indictment because of government misconduct

and requested an evidentiary hearing. Petitioner alleged in that motion that state law enforcement agents had engaged in misconduct by (1) contacting numerous representatives of the media for the purpose of providing them with the substantive results of the investigation of petitioner together with derogatory and prejudicial comments concerning petitioner, including reference to his criminal record; (2) giving prior notice to television stations that a search warrant was to be executed at petitioner's office so as to maximize television coverage of that event; and (3) recruiting a television investigative reporter to act as an undercover agent to gather information concerning petitioner for both presentation to the grand jury and for use in a television documentary describing the investigation of petitioner.

The government's response to this motion did not deny its factual allegations.

In response, the trial judge entered a summary order declining to schedule an evidentiary hearing and denying all pretrial motions. Thereafter, petitioner filed an offer of proof pursuant to Rule 103(a)(2), Federal Rules of Evidence, to the effect that state and federal agents had engaged in close complicity in an effort to create and disseminate adverse pre-indictment publicity concerning defendant including numerous newspaper articles and the television filmed documentary and voice tape previously described. A copy of the video tape television film documentary was filed for review by the trial judge.

A review of this television documentary shows numerous pictures portraying evidence gathered in the course of the

investigation, including surreptitiously recorded conversations between the television undercover agent and the petitioner, prescriptions written by the petitioner, and medical records seized from petitioner's office pursuant to a federal search warrant. Additionally, the film portrays the undercover activity of two other agents as well as the results of their investigation. The petitioner's actions are criticized by a "doctor" and speculation is offered as to the harmful results which one could expect from taking the drugs prescribed. The petitioner's criminal and previous disciplinary history is also described. The second segment of the film documentary is liberally interspersed with comments by a G.B.I. agent which are critical of the efforts of the medical professional at self-regulation, specifically in respect to the commentator's under-

standing of the history of the petitioner's treatment by the Georgia State Composite Board of Medical Examiners. Finally, this G.B.I. agent characterizes defendant's conduct as "slimy behavior...criminal behavior".

In a startling display of candor during oral argument before the Court of Appeals, counsel for the government characterized the conduct of the agents with respect to the use of an undercover agent --investigative reporter as "reprehensible". The panel agreed, noting in its opinion that "the deliberate use of a news reporter as an undercover agent in an investigation by federal law enforcement officials, coupled with resulting adverse publicity prior to arrest and trial, is inconsistent with our notions of due process and unnecessarily endangers a defendant's right to a fair trial". Nevertheless, the Court

of Appeals declined to exercise its supervisory power over federal law enforcement officials, opting instead to simply "admonish" them from "similar behavior in the future".

As previously noted, various medical records and other items were seized from petitioner's office pursuant to a federal search warrant issued on affidavits submitted by G.B.I. agents to a United States Magistrate. A pre-trial motion sought suppression of this evidence, alleging inter alia, that the issuing magistrate was not neutral and detached. This motion was summarily denied by the trial court without an evidentiary hearing. Petitioner then filed a written offer of proof under Rule 103(a)(2), Federal Rules of Evidence. In part, this offer stated petitioner's intent to prove, "That said United States Magistrate maintained a bias and predisposition against defendant such that he

could not objectively enter a judicial order with respect to defendant".

On appeal petitioner urged error under 28 U.S.C. §§455(a), 455(b)(1) and 455(b)(3). Specifically, petitioner argued that the issuing Magistrate was disqualified for personal bias, for his prosecutorial role in a previous proceeding against petitioner, and because of a reasonable appearance of partiality. The latter two grounds were fully analyzed and decided adversely to petitioner in Division III of the panel opinion of the Court of Appeals. Curiously, however, the issue concerning personal bias was summarily rejected without discussion. Despite the specific offer of proof of personal bias, the panel disposed of this issue in the following language:

> Sections 455(b)(1) and 455(b)(3) are not applicable to this situation. The former contemplates a personal, or extra-judicial bias against a litigant.

> Appellant has made no such claim on appeal.

This characterization of petitioner's appellate posture was so obviously erroneous that a petition for panel rehearing was filed. That petition made pointed reference to the offer of proof and cited the panel to the specific page of petitioner's brief on appeal wherein the grounds of personal or extra-judicial bias were argued. A plain reading of the pertinent portion of the record and briefs clearly illustrate that petitioner explicitly claimed personal bias. Thus, the panel's assertion that, "appellant has made no such claim on appeal" is incomprehensible. Nevertheless, the petition for panel rehearing was summarily denied.

REASONS FOR GRANTING THE WRIT

1. Intentional creation, by law enforcement officers, of pre-indictment adverse publicity raises important question of federal practice in the administration of criminal justice, requiring the exercise of this Court's supervisory power.

The requirement for indictment in federal prosecutions is mandated by the Fifth Amendment of the Constitution of the United States. This Court has stated that said mandate is "... in recognition of the fact that the intervention of a grand jury was a substantial safeguard against oppressive and arbitrary proceedings". Smith v. United States, 306 U.S. 1, 9 (1959). In further reference to the function of the grand jury this Court, in Wood v. Georgia, 370 U.S. 375 (1962), stated:

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accussed, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will. (Citations omitted)

370 U.S. at 390

The "substantial safeguard" the indictment provides in federal prosecutions is destroyed where law enforcement officers intentionally and deliberately instigate, produce and disseminate adverse pre-indictment publicity against a prospective defendant. The exercise of this Court's supervisory power over federal prosecutions is required in this case in order to protect the right to indictment in federal prosecutions as a substantial

safeguard against oppressive and arbitrary proceedings.

This Court has previously considered an issue of pre-indictment publicity in Beck v. Washington, 369 U.S. 541 (1962). That case, however, did not reach the issues raised under the facts in the case at bar. Beck did not involve intentional government created and disseminated pre-indictment publicity. And, Beck did not involve the invocation of the supervisory power of this Court over federal prosecutions. Instead, Beck concerned a petitioner's claim to an unbiased grand jury in a state court prosecution as a matter right under the Due Process Clause of the Fourteenth Amendment.[2/]

2/ The Court did not reach the due process issue because it concluded that the state had provided petitioner with an unbiased grand jury. Beck v. Washington, 369 U.S. 541, 546 (1962 For a review and discussion of federal cases involving defendants' claims to an impartial and unbiased federal grand jury, see Bartlett, Defendants Right to an Unbiased Federal Grand Jury, 47 B.U.I. Rev. 551 (1967)

No prior reported pre-indictment publicity cases have raised the issue presented in the case at bar by the government's deliberate use of a television-news reporter to intentionally instigate, create and disseminate prejudicial pre-indictment publicity in a federal prosecution. 3/

This is not a case in which a vigorous and independent press procured and published information which the public had a

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3/ A number of federal district courts have issued opinions on motions to dismiss indictments based on alleged prosecutorial misconduct through releasing information to the news media. In United States v. Kahaner, 204 F. Supp. 921 (S.D.N.Y.1962) aff'd., 317 F.2d 459, cert. denied 375 U.S. 836 (1963) the court held that defendant failed to prove government involvement. In other cases the courts have held that dismissal of the indictment was too severe a sanction under the particular facts of the case. United States v. Tallant, 407 F. Supp. 878 (N.D. Ga. 1975);United States v. Archer, 355 F. Supp. 981 (S.D.N.Y.1972); and United States v. Hoffa, 205 F. Supp. 710 (S.D. Fla. 1962). The Georgia Supreme Court has also declined to dismiss an indictment for intentional government creation of pre-indictment publicity. Strong v. The State, 246 Ga. 612 (1980).

right to know. 4/

Rather, from the very beginning of the government's criminal investigation, and of unprecedented significance, there existed a total merger of government investigation and press functions in the person of a television-news reporter who was recruited by law enforcement officials to participate as an agent in the undercover investigation. With the government's active support and assistance the television-news reporter was involved in the criminal investigation of petitioner in a dual capacity--as a government undercover agent, and an investi-

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4/ For cases that consider the conformation of rights of free speech and the free press and the right of a defendant to due process and a fair trial see, Chandler v. State of Florida, 449 U.S. 560 (1981); Murphy v. Florida, 421 U.S. 794 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); and Marshall v. United States, 360 U.S. 310 (1959).

gative reporter preparing a television documentary of the investigation.

In addition to using a television investigative reporter (working on a television documentary which was aired on statewide television before presentation of the investigation to a grand jury), [5/] the government officers contacted members of the media and solicited additional adverse pre-indictment publicity against petitioner.

Grand jury proceedings constitute "a judicial inquiry". Cobbledick v. United States, 309 U.S. 323, 327 (1940). And, the grand jury traditionally exists only as an appendage of the Court. Smith v.

5/ A review of this television documentary is most illuminating on the question of governmental intent in causing such a documentary to be filmed and disseminated. See, pp. 15-17 Statement of Case.

United States, 360 U.S. 1 (1959); Brown v. United States, 359 U.S. 41, 49 (1959). Accordingly, federal appellate courts have exercised their supervisory power to correct abuses of the grand jury process and to insure the fairness of grand jury proceedings. In re April 1977 Grand Jury Subpoenas, General Motors Corporation v. United States, 573 F.2d 936, 941 (6th Cir. 1978); United States v. Chanen, 549 F.2d 1306, 1313 (9th Cir. 1977), cert. denied 434 U.S. 825 (1977).

In other matters involving unfair and prejudicial government practices in federal prosecutions this Court has exercised its supervisory power, on petition for certiorari, to correct such unfair government conduct. McNabb v. United States, 318 U.S. 332, 341 (1943). This Court has also exercised its supervisory power to correct

prejudicial practices in federal prosecutions not involving government misconduct. Marshall v. United States, 360 U.S. 310 (1959); Mesarosh v. United States, 352 U.S. 1, 14 (1956); Offutt v. United States, 348 U.S. 11, 13 (1954).

On issues of criminal petit jury prejudicial publicity this Court has been particularly sensitive to defendants' claims where government officers have collaberated with the press to "frustrate the Court's function". Sheppard v. Maxwell, 384 U.S. 333, 363 (1966); Rideau v. State of Louisiana, 373 U.S. 723 (1963). 6/

6/ Of particular significance to this case is the statement in the dissent:

> First, I do not believe it within the province of law enforcement officers actively to cooperate in activities which tend to make more difficult the achievement of impartial justice. Therefore, if this case arose in a federal court, over which we exercised supervisory powers, I would vote to reverse the judgment before us. It

(cont'd)

One federal district court has issued similar warnings to government officers involved in pre-indictment prejudicial publicity. United States v. Sweig, 316 F. Supp. 1148, 1153 (E.D.N.Y. 1970), aff'd 441 F.2d 114 114 (2nd Cir. 1971), cert. denied, 403 U.S. 932 (1971).

The case at bar presents an egregious example of intentional interference by law enforcement officers with a significant stage of the judicial proceedings in a criminal prosecution. The grand

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6/ cont'd

> goes without saying, however, that there is a very significant difference between matters within the scope of our supervisory power and matters which reach the level of constitutional dimension. (Citations omitted)

373 U.S. at 728, 729

jury and the indictment process can provide no function at all if law enforcement officers are permitted, through intentional creation of adverse publicity, to subject grand jurors to subtle or explicit demands for prosectuion by "the generation of public animus against a prospective defendant...." 7/

The exercise of this court's supervisory power is needed in the case at bar to restore to the grand jury in federal prosecutions the substantial safeguard it was intended to provide.

2. By failing to give effect to petitioner's offer of proof the Court of Appeals so far departed from the accepted and usual course of judicial proceedings

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7/ United States v. Sweig, 316 F. Supp. 1148, 1153 (E.D.N.Y. 1970) aff'd., 441 F.2d 114 (2nd Cir. 1971), cert. denied, 403 U.S. 932 (1971).

as to call for an exercise of this Court's supervisory power.

Rule 103, Federal Rules of Evidence , establishes the procedure for preservation of the appellate record when evidence is admitted or excluded over objection.

Here, a pre-trial motion to suppress sought an evidentiary hearing to prove, inter alia, that the issuing Magistrate maintained a personal bias against petitioner. The opportunity to offer appropriate evidence on this issue was foreclosed by the trial court's refusal to take evidence and summary denial of the motion. Given this posture, petitioner attempted to preserve the issue for review by filing his written offer of proof pursuant to Rule 103(a)(2). He then specifically relied on this offer in framing an appellate issue concerning the Magistrate's bias against him. The Court of Appeals

gave absolutely no effect to this offer of proof and concluded that petitioner had failed to claim personal or extra-judicial bias.

Petitioner submits that grievous error has occurred under these circumstances. Despite the trial court's actual knowledge that the issuing Magistrate had previously prosecuted petitioner on similar charges, and in the face of an explicit claim of personal bias, petitioner was not even afforded a reasonable opportunity to prove his claim. Since case authority uniformly requires adherence to Rule 103, Federal Rules of Evidence to preserve appellate issues the procedure specified therein was followed. See generally 10 Moore's Fed. Prac. §§103.21, 103.22.

The purpose of the offer of proof [Rule 103(a)(2)] is "to alert the court and opposing counsel to the thrust of the

excluded evidence, enabling them to take appropriate action, and to provide an appellate court with a record allowing it to determine whether the exclusion was erroneous or not". 10 Moore's Fed. Prac. §103.22, p. 1-31; see also Advisory Committee's Note, Rule 103(a). By failing to make an evidentary inquiry into petitioner's allegation of personal bias, the trial court effectively excluded evidence. The substance of the proposed evidence was then made known to the court and opposing counsel. No attempt was made by either to add any additional information despite the trial court's broad discretion to supplement the offer. Rule 103(b). Thus, a complete record was available for appellate review. Thereafter, an explicit claim of personal bias was argued on appeal. When this claim was ignored by the panel, a petition for rehearing was filed directing the panel's attention to

the offer of proof and the Brief of Appellant which described all of the relevant circumstances. No relief was forthcoming.

In sum, this petitioner has been denied all opportunity to litigate a fundamental issue of determinative significance. Such treatment offends the most rudimentary notions of due process of law.

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons set forth above.

Respectfully submitted,

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January 22, 1982

APPENDICES

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT B

NO. 80-7497

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES E. OUTLER,

Defendant-Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA

Before MORGAN, KRAVITCH and ANDERSON, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

Appellant, Dr. James E. Outlar, was tried and convicted in United States District Court for the Middle District of Georgia on twenty counts of violating §§ 841(a) and 844 of the Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.* Counts One through Fifteen involved charges of prescribing or, in the language of the CSA, "dispensing" controlled drugs. Counts Sixteen through Twenty charged appellant with unlawful possession of controlled drugs.

Dr. Outlar apparently was abusing his status as a duly licensed and registered physician to prescribe Schedule III and IV drugs in Warner Robbins, Georgia. Several undercover agents, acting as patients, were able to obtain prescriptions for controlled drugs after undergoing little or no physical examination. On several occasions, these "patients" told Dr. Outlar that the drugs eventually would be given to others, used at parties, or even resold, but Dr. Outlar still continued to issue prescriptions. During the course of this investigation, agents concealed microphones and recorded their conversations with appellant. One agent regularly worked for an Atlanta television station but temporarily was working in conjunction with law enforcement officials.

She later incorporated many of the taped conversations and other products of the investigation into a two-part television special report. At the close of the investigation, a United States Magistrate issued a search warrant authorizing federal agents to enter Dr. Outlar's office and seize any medical records connected with the investigation. Execution of the search warrant followed immediately, and government agents seized Dr. Outlar's medical records. During the process, they observed Schedule II controlled drugs in appellant's office. The agents were aware that Dr. Outlar previously had surrendered his license to prescribe Schedule II drugs, and accordingly, also seized the drugs. This event resulted in the five possession counts of the indictment. Prior to trial, and again during trial, Dr. Outlar moved to sever the fifteen dispensing counts from the five possession counts. He wished to testify as to the possession counts, but remain silent as to the dispensing charges. The trial court denied both motions.

This appeal raises four issues. First, Dr. Outlar charges that the trial court erred in denying his motion to dismiss Counts One through Fifteen of the grand jury indictment for failure to charge an offense. Second, he claims that the entire indictment should have been dismissed because of governmental misconduct in the preparation and dissemination of publicity prior to his arrest. Third, he alleges that medical records and Schedule II drugs were illegally seized from his office because the Magistrate who issued the search warrant was not neutral and detached. Finally, Dr. Outlar charges that the trial court's refusal to sever Counts One through Fifteen from Counts Sixteen through Twenty unduly prejudiced his defense. We must agree with appellant on the first issue and reverse the court below. We affirm the trial court's rulings on the remaining issues.

I. *The Indictment*

[1] Appellant claims that Counts One through Fifteen of his indictment, the dispensing charges, omit an essential ele-

ment of the crime, and thereby fail to charge an offense under 21 U.S.C. § 841(a). This claim is based on the omission of any language alleging that Dr. Outlar prescribed drugs without a legitimate medical reason or beyond the course of professional practice. Each count is virtually identical for purposes of this appeal. Count One states:

> That on or about October 12, 1979, in the Macon Division of the Middle District of Georgia, and within the jurisdiction of this Court, James E. Outlar did unlawfully and intentionally distribute, dispense, and caused to be distributed and dispensed, a quantity of benzphetamine in the form of Didrex tablets, a Schedule III drug, by means of a prescription to Rita Bragg, in violation of 21 United States Code, Section 841(a).

Appellant moved for dismissal of these counts prior to trial and the motion was denied. At trial, however, the prosecution introduced sufficient evidence to prove that each prescription lacked a legitimate medical reason, and the jury instructions included this element and charged the prosecution with the burden of proof. Therefore, the question before us is narrow: Whether a grand jury indictment which charges a physician with prescribing drugs in violation of 21 U.S.C. § 841(a) must allege that the prescription lacked a legitimate medical reason? The question is one of first impression to this court.[1] Other circuits have reached inconsistent results.[2] For the following reasons, we believe that the lack of a legitimate medical reason is an essential

1. In *United States v. Jackson*, 576 F.2d 46 (5th Cir. 1978), we noted the issue but left its resolution "to another day."

2. In *United States v. King*, 587 F.2d 956 (9th Cir. 1978), the Ninth Circuit held that the allegation is necessary in order to charge a physician with illegal prescriptions in violation of 21 U.S.C. § 841(a); however, in *United States v. Roya*, 574 F.2d 386 (7th Cir.), *cert. denied*, 439 U.S. 857, 99 S.Ct. 172, 58 L.Ed.2d 165 (1978), the Seventh Circuit reached the opposite result.

element of this offense, and therefore must be alleged in the indictment.

Congress enacted the CSA in 1970 in order to strengthen federal control over illegal drug traffic. Accordingly, the CSA contains a blanket prohibition against any transaction which involves a controlled substance: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance...." 21 U.S.C. § 841(a)(1). Of course, legitimate drug manufacturers and various professionals, such as licensed physicians and pharmacists, are authorized once they have registered with the Attorney General. "Persons registered by the Attorney General ... to manufacture, distribute, or dispense controlled substances are authorized to possess, manufacture, distribute, or dispense such substances ... to the extent authorized by their registration...." 21 U.S.C. § 822(b). A strict reading of these two sections of the CSA would authorize a physician to prescribe drugs freely and without medical reason so long as the physician is registered with the Attorney General; however, the CSA has not been interpreted so mechanically.

In *United States v. Moore*, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975), the Supreme Court held that a physician may be charged with a criminal violation of § 841(a) of the CSA whenever he or she prescribes a controlled substance without a legitimate medical reason. The physician is criminally liable even though registered with the Attorney General and seemingly authorized under § 841(a). The court noted that the qualifying condition of the offense, *i. e.*, the element of behavior beyond professional practice, was not expressly stated in the relevant sections of the CSA, but rather, "implicit" to the statutory scheme. *United States v. Moore*, 423 U.S. at 141, 96 S.Ct. at 345. The decision did not address the questions of indictment and burden of proof. This court, however, repeatedly has held since *Moore* that it is incumbent upon the government to prove the lack of a legitimate medical reason in order to convict a registered physician of dispensing drugs in violation of 21 U.S.C. § 841(a). *United States v. Rosen*, 582 F.2d 1032 (5th Cir. 1978); *United States v. Rogers*, 609 F.2d 834 (5th Cir. 1980); *United States v. Guerrero*, 650 F.2d 728 (5th Cir. 1981). We now conclude that this element is essential to a charge of the offense. We recognize that an element is not always an "essential element"

simply because the prosecution carries the burden of proof; however, here the element embodies the culpability of the offense. Without behavior beyond professional practice, there is no crime. We believe, therefore, that the lack of a legitimate medical reason is as essential to the offense charged against Dr. Outlar as the requisite *mens rea*.

The United States Attorney responds that the lack of a legitimate medical reason is not an essential element. The government argues instead that the *presence* of a legitimate medical purpose is a statutory exception to the general offense stated in 21 U.S.C. § 841(a).[3] The

3. The distinction is very significant. Generally, a statutory exception to an offense need not be alleged in the indictment and the burden of proving compliance with the exception is upon the defendant. *McKelvey v. United States*, 260 U.S. 353, 357, 43 S.Ct. 132, 134, 67 L.Ed. 301 (1922). If in this case the presence of a legitimate medical purpose is a statutory exception to 21 U.S.C. § 841(a), then the burden of proving compliance with the exception properly could be placed upon a physician-defendant. In other words, a grand jury properly could return an indictment against any doctor for prescribing a controlled drug, and the doctor always would have the burden at trial of proving the prescription was based on a legitimate medical need. The effect of this scheme would be a presumption that every physician who prescribes a drug does so without a legitimate medical reason. We do not believe Congress intended this result.

language of the CSA apparently is constructed in this manner.[4] We note, however, that an essential element is not always expressed in the statutory definition of the offense, but actually may be the negation of an exception to the offense. In rare instances, an exception

4. "Implicit in the registration of a physician is the understanding that he is authorized only to act 'as a physician'." *United States v. Moore*, 423 U.S. at 141, 96 S.Ct. at 345. Federal law preceeding the CSA clearly was constructed in this way; an exception to the general prohibition expressly covered "practitioners licensed by law to prescribe . . . drugs, *while acting in the course of their professional practice* (emphasis added)." Federal Food, Drug, and Cosmetic Act, § 511(a)(4), 79 Stat. 228.

The United States Attorney mistakenly relies upon our decision on this same question under the earlier Act. In *United States v. Ramzy*, 446 F.2d 1184 (5th Cir.), *cert. denied*, 404 U.S. 992, 92 S.Ct. 537, 30 L.Ed.2d 544 (1971), we concluded that the presence of a legitimate medical reason was an affirmative defense provided in a statutory exception. However, we already have refused to apply the rationale of *Ramzy* to the CSA. In repeated decisions, we have held that the prosecution must prove the lack of a legitimate medical reason. Unlike our decision in *Ramzy*, the presence of a legitimate medical reason is not an affirmative defense under CSA. *See, e. g., United States v. Rogers*, 609 F.2d 834 (5th Cir. 1980).

can be so necessary to a true definition of the offense that the elements of the crime are not fully stated without the exception. *Sutton v. United States*, 157 F.2d 661, 666 (5th Cir. 1946). We believe this to be the case whenever a physician is charged with prescribing drugs in violation of 21 U.S.C. § 841(a).

[2] There is no question that a grand jury indictment must set forth each essential element of an offense in order for a resulting conviction to stand. *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); *United States v. Huff*, 512 F.2d 66 (5th Cir. 1975); *United States v. Varkonyi*, 645 F.2d 453 (5th Cir. 1981). This well settled rule serves a dual function. First, the Sixth Amendment to the Constitution requires that every criminal defendant "be informed of the nature and cause of the accusation." Inclusion of the essential elements of an offense in an indictment provides the accused with the bare minimum of information necessary to meet

this requirement.[5] Second, the Fifth Amendment guarantees the right of a grand jury indictment to each defendant prosecuted for an "infamous", or serious, crime. A grand jury can perform its function of determining probable cause and returning a true bill only if all elements of the offense are contained in the

5. Of course, more than the essential elements of an offense is usually necessary. The defendant must be informed of which transaction, or facts, give rise to the alleged offense. Moreover, the indictment must contain enough information to show the defendant to what extent he may plead "double jeopardy" if further proceedings are instituted. *See Russell v. United States*, 369 U.S. at 763–4, 82 S.Ct. at 1046–47.

indictment.[6] *Russell v. United States*, 369 U.S. at 771, 82 S.Ct. at 1051; *United States v. Diecidue*, 603 F.2d 535, 546 (5th Cir. 1979).

We note, however, that if the Sixth Amendment requirements were the sole basis for this rule, then appellant would not succeed on appeal. The purpose of the Sixth Amendment guarantee is to allow the defendant to prepare a full defense and insure that he is not surprised at trial. *Russell v. United States*, 369 U.S. at 763–4, 82 S.Ct. at 1046–47.

6. The government contends in the alternative that the words "unlawfully" and "by means of a prescription" in Dr. Outlar's indictment are sufficient to substitute for "lack of a legitimate medical reason." We disagree. An "unlawful prescription" is not synonymous with a "prescription lacking a legitimate medical purpose." The wording of this indictment could serve to charge a physician with failure to obtain a license or registration. We recognize, however, that there are no specific words necessary to phrase this element. *See, e. g., United States v. Jackson*, 576 F.2d 46 (5th Cir. 1978) ("under the guise and artifice of operating a 'mental health clinic' " is sufficient to charge this element of the offense).

Dr. Outlar cannot claim that he was surprised at trial or unduly prejudiced in the preparation of his defense. The record below convinces us that Dr. Outlar was fully aware of the charges against him several weeks before trial.[7] It is the Fifth Amendment guarantee with which we are concerned. Unless every element of an offense appears in the indictment, it is impossible to assure the defendant that a grand jury properly determined probable cause of the offense. *See Honea v. United States*, 344 F.2d 798 (5th Cir. 1965). We have little doubt that the grand jury in this case still would have returned a true bill against the appellant if the indictment had been constructed properly. Moreover, each member of the grand jury most likely considered the very element which is fatally omitted. An indictment against a physician for unlawfully prescribing drugs naturally will raise a question in the minds of most people as to the legitimacy of the physician's conduct. However, we cannot speculate. "To allow . . . a subsequent guess as to what was in the minds of the grand jury at the time they returned the

7. For example, three weeks before trial appellant first moved to dismiss Counts One through Fifteen of the indictment for failure to allege that the prescriptions were issued without a legitimate medical reason. Obviously, he was aware this element was at issue.

indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure." *Russell v. United States*, 369 U.S. at 770, 82 S.Ct. at 1050.

II. *Prosecutorial Misconduct*

Appellant argues that his entire indictment should have been dismissed because of governmental misconduct during and after the investigation of his medical practice. This argument centers on the apparent complicity between law enforcement officials and the news media in generating adverse publicity toward appellant prior to his indictment and arrest.

One of the undercover agents who participated in the investigation of Dr. Outlar regularly worked as a reporter for an Atlanta television station, one hundred miles from appellant's community. The record is not clear as to how the reporter became involved in the investigation, although it is clear that federal law enforcement officials were aware of her occupation. As a reporter, she obtained several of the secretly taped conversations that were part of the investigation and incorporated them into a two-part

television "special report" on unethical doctors. This report specifically discussed Dr. Outlar and reviewed his past criminal activity. One Georgia Bureau of Investigation agent who was interviewed for the report described Dr. Outlar's actions as "slimy behavior" and "criminal behavior." Other evidence gathered in the investigation also appeared on television. The report was broadcast in Atlanta within one week after the execution of the search warrant, and before an indictment was submitted to a grand jury. Prior to trial, appellant vigorously objected to this activity as inherently prejudicial to his case, although he never requested a change of venue. The trial judge, obviously aware of possible bias, conducted a careful and thorough examination of prospective jurors during *voir dire* and made every effort to insure the empaneling of an impartial petit jury. Indeed, appellant now concedes that he suffered no prejudice at trial.

[3, 4] Generally, a conviction will be reversed because of prejudicial publicity only if the defendant can demonstrate actual petit jury prejudice. *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962); *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1505, 47 L.Ed.2d 760 (1976). In the present case, appellant admits that no actual prejudice occurred, but instead requests that we invoke our supervisory powers over federal law enforcement officials and dismiss appellant's indictment because of governmental involvement in the publicity. We do not believe this situation necessitates such a drastic action. It is not our intent, however, to belittle appellant's argument and approve the conduct of this investigation. We admonish federal law enforcement officials in this circuit from similar behavior in the future. If there were any doubt as to the impartiality of the petit jury in this case, we would reverse. The deliberate use of a news-reporter as an undercover agent in an investigation by federal law enforcement officials, coupled with resulting adverse publicity prior to an arrest and trial, is inconsistent with our notions of due process and unnecessarily endangers a defendant's right to a fair trial.

III. *The Search Warrant*

[5] Appellant's third claim on appeal is that various medical records and Schedule II drugs were illegally seized from his office. This claim is premised on appellant's belief that the Magistrate who issued the search warrant was not neutral and detached. We cannot agree with the argument.

Dr. Outlar is not a stranger to federal courts. In July of 1974, he pled guilty in district court to income tax evasion and was sentenced to five years imprisonment. All but sixty days of this sentence was to be served on probation. In October of 1975, an investigation began into the legitimacy of Dr. Outlar's medical practice. A probation revocation hearing was held in February of 1977, and the trial judge determined that Dr. Outlar was prescribing Schedule II drugs without a legitimate medical purpose. At this point Dr. Outlar surrendered his Schedule II license, and his probation was revoked

for six months. One of the Assistant United States Attorneys who represented the government at the probation revocation hearing was John D. Carey. In October of 1979, almost three years after this hearing, a second investigation into appellant's medical practice began. In November of 1979, United States Magistrate John D. Carey issued a search warrant for Dr. Outlar's office which was based on information gathered exclusively during the second investigation. Magistrate Carey had left the United States Attorney's office approximately two years earlier, and he took no part in the second investigation of Dr. Outlar, or the trial below, other than to issue the search warrant. Appellant contends now that Magistrate Carey was obligated to disqualify himself when presented with the

search warrant because of his role as prosecutor in the earlier probation revocation hearing. Appellant specifically relies on 28 U.S.C. §§ 455(a), 455(b)(1), and 455(b)(3).[8] We believe none of these sections compelled Magistrate Carey's disqualification.

8. 28 U.S.C. § 455 states in part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> . . . . .
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy....

Section 455(a) establishes a reasonable man standard. *Whitehurst v. Wright*, 592 F.2d 834, 838 (5th Cir. 1979). In other words, is there a sufficient basis for a reasonable man to believe that Magistrate Carey was not impartial when he issued the search warrant, and therefore obligated to disqualify himself? We find that such a basis does not exist in this instance. The affidavit presented to Magistrate Carey in support of this search warrant contained information which was overwhelmingly sufficient to indicate probable cause. The drugs, agents, dates, and all other details set forth in the affidavit were wholly independent of the events involved in the earlier probation revocation hearing. There clearly was no connection between the two proceedings. Absent other factors, there is no reason to believe Magistrate Carey did not act impartially.

[6] Sections 455(b)(1) and 455(b)(3) are not applicable to this situation. The former contemplates a personal, or extrajudicial, bias against a litigant. *See In Re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir. 1980). Appellant has made no such claim on appeal. The latter section is applicable only when

the two proceedings have a common, single transaction or event at issue. *See Mixon v. United States*, 620 F.2d 486 (5th Cir. 1980). There was no connection between appellant's probation revocation hearing in 1977 and the investigation of his medical practice in 1979. No single fact or event was common to both proceedings. Accordingly, Magistrate Carey was not required to disqualify himself from issuing the search warrant in question, and all evidence was properly seized and admitted.

IV. *Severance*

[7] Appellant's final claim is that the trial judge erred in refusing to sever the dispensing counts from the possession counts. Appellant cites two reasons for the error. First, Dr. Outlar wished to give testimony concerning the possession counts but remain silent as to the dispensing counts. He claims that the refusal to sever forced him to choose his right to remain silent over his right to testify, and the result unduly prejudiced his defense. Second, Dr. Outlar contends that the failure to sever resulted in cross-count prejudice. As a preliminary step, we find as a matter of law that the initial

joinder of the possession counts and the dispensing counts in Dr. Outlar's indictment was appropriate under Rule 8 of the Federal Rules of Criminal Procedure. *See United States v. Park*, 531 F.2d 754, 761 (5th Cir. 1976). The separate question of whether to sever the counts of this indictment pursuant to Rule 14 of the Federal Rules of Criminal Procedure was a matter of discretion for the trial judge. *Id.* The trial judge must balance any possible prejudice to the defendant against judicial economy. *United States v. Forrest*, 623 F.2d 1107, 1115 (5th Cir.), *cert. denied*, —— U.S. ——, 101 S.Ct. 327, 66 L.Ed.2d 153 (1980). "Absent a showing by defendant of abuse of that discretion, an appellate court will not substitute its own judgment for that of the lower court." *United States v. Cuesta*, 597 F.2d 903, 919 (5th Cir.), *cert. denied*, 444 U.S. 964, 100 S.Ct. 451, 62 L.Ed.2d 377 (1979). Dr. Outlar has not met this burden of proof on either of his claims.

[8] "Severance is not mandatory simply because a defendant indicates that he wishes to testify on some counts but not on others." *Alvarez v. Wainwright*, 607 F.2d 683, 685 (5th Cir. 1979). The defendant must give the trial judge enough information to prove that he has both important testimony to give on one offense and a strong need to refrain from testifying on the other. *Id.* at 686. At trial, Dr. Outlar wanted to testify that he was unaware Schedule II drugs remained in his office after he surrendered his license to prescribe these drugs. However, this same testimony was given by another defense witness, Dr. Outlar's nurse, and we believe the jury naturally assumed that Dr. Outlar would corroborate the favorable testimony of his own witness. Dr. Outlar failed at trial and on appeal to explain how his own testimony would substantially further his defense other than to duplicate the testimony of another witness. Moreover, Dr. Outlar

has made no explanation as to why it was important for him to remain silent as to the dispensing charges, other than express his desire to do so. Therefore, the trial judge did not abuse his discretion in refusing to grant a severance because of appellant's desire to testify only on the possession charges.

Appellant's pre-trial motion to sever did not allege the possibility of cross-count prejudice. Even now, he only can cite to one instance at trial where he believes cross-count prejudice occurred, and this argument is difficult to comprehend. The trial court properly admitted into evidence the fact that Dr. Outlar previously had surrendered his Schedule II license as relevant to the issue of knowledge and intent on the dispensing counts. *See United States v. Park*, 531 F.2d at 762. However, the trial judge later repeated this evidence while charging the jury on the possession counts. Appellant somehow perceives this as cross-count prejudice. We cannot agree. The evidence is relevant and not prejudicial to either offense. The jury was never informed of the circumstances surrounding the surrender of Dr. Outlar's Schedule II license. We find the record void of any cross-count prejudice, and therefore free of error.

For the above reasons, we reverse the district court below in part. Counts One through Fifteen of appellant's indictment are insufficient to charge an offense. We affirm the trial court's ruling on all other issues.

REVERSED IN PART AND AFFIRMED IN PART.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 80-7497

D.C. DOCKET NO. CR-80-5-MAC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES E. OUTLER,

Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA

Before MORGAN, KRAVITCH and ANDERSON,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby, reversed in part and affirmed in part in accordance with the opinion of this court.

October 26, 1981

ISSUED AS MANDATE:

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT B

NO. 80-7497

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES E. OUTLER,

Defendant-Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA

ON PETITION FOR REHEARING
(November 24, 1981)

Before MORGAN, KRAVITCH and ANDERSON,
Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ PHYLLIS A. KRAVITCH
United States Circuit Judge

*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452-October 14, 1980)

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT B

NO. 80-7497

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES E. OUTLER,

Defendant-Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA

ON PETITION FOR REHEARING

(DEC 30, 1981)

Before MORGAN, KRAVITCH, and ANDERSON,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition of appellee for rehearing filed in the above entitled and numbered cause be and same is

hereby DENIED.

ENTERED FOR THE COURT:

/s/ PHYLLIS A. KRAVITCH
United States Circuit Judge

*Former Fifth Circuit; (Section 9(1) of Public Law 96-452-October 14, 1980)